

Proposed Amendment to Board Policies and Procedures, No. 2

The following addition to the board's Policies and Procedures has been proposed:

No Authority board member who holds another public office incompatible with Authority board membership may participate in board or committee discussion or action that falls within the jurisdiction or reasonably could affect an interest of the other public office.

This language, if adopted, could be added to Article VI, with a change to the Article VI heading, or added as part of a new article.

Analysis

This amendment to the Policies and Procedures would address the situation where the board or one of its committees is considering or taking action on a matter that falls within the jurisdiction or reasonably could affect an interest of another public office when that other public office is held by a member of the Authority board.

The Law Concerning Incompatible Offices

The common law, recently codified as Government Code section 1099, prohibits a person from holding incompatible offices. The law describes three situations in which two offices are deemed incompatible:

1. When one of the offices may "audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body."
2. "Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices."
3. "Public policy considerations make it improper for one person to hold both offices."

In the case of the second situation described above, it is not necessary that an actual conflict exist in order for two offices to be incompatible. It is the possibility that a conflict could arise that matters. "Prospective as well as present clashes of duties and loyalties give rise to the prohibition. Only one significant clash is required to make offices incompatible." (82 Ops. Cal. Atty. Gen. 201.) Moreover, "[t]he ability to abstain when a conflict is presented will not excuse the incompatibility or obviate the effects of the prohibition."

The legal consequence of assuming an incompatible office is described as follow:
"When two public offices are incompatible, a public officer shall be deemed to have forfeited

the first office upon acceding to the second.” (Gov. C. sec. 1099, subd. (b).) In the event a public officer fails voluntarily to vacate his or her first office, section 1099 is enforceable through a procedure known as the *quo warranto* process. (See Code of Civil Procedure, sec. 803.)

Effect of the Proposed Amendment

The proposed amendment would operate to prevent a board member from taking part in discussions or decisions pertaining to a matter in circumstances where both of the following are true: (1) the board member holds another office incompatible with board membership and (2) the matter that is the subject of the discussion or the proposed action falls within the jurisdiction of the other office or reasonably could affect an interest of the other office. These two elements are related, in that they are both based on a possible “clash of duties or loyalties between the offices.” In effect, when those circumstances are present the board member would be required, by the policy, to recuse himself or herself.

It should be noted that the proposed policy does not purport to override section 1099 or to replace it, nor can it do so. Although recusal would not satisfy the effects of the statutory prohibition against holding incompatible offices, it would satisfy the proposed policy against participating in a matter that affects both the Authority and the other office.